Filed 7/10/19 P. v. Hunter CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DAVID ROY HUNTER, JR., Defendant and Appellant.	E070848 (Super.Ct.No. BAF1601512) ORDER MODIFYING OPINION AND DENYING PETITION FOR REHEARING [NO CHANGE IN JUDGMENT]

THE COURT

The court has reviewed the petition for rehearing filed June 28, 2019. The petition is denied. The opinion filed in this matter on June 17, 2019 is modified as follows:

In the last paragraph on page 12, the following is deleted:

> He has forfeited this as grounds for reversal by failing to raise it under a separate heading, as required. (Cal. Rules of Court, rule 8.204(a)(1)(B); *People v. Luo* (2017) 16 Cal.App.5th 663, 678, fn. 6; *People v. Roscoe* (2008) 169 Cal.App.4th 829, 840.) In any event,

and replaced with:

> However,

Except for these modifications, the opinion remains unchanged. This modification does not effect a change in the judgment.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P. J.

We concur:

RAPHAEL
J.

MENETREZ
J.

Filed 6/17/19 P. v. Hunter CA4/2 (unmodified opinion)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DAVID ROY HUNTER, JR., Defendant and Appellant.	E070848 (Super.Ct.No. BAF1601512) OPINION

APPEAL from the Superior Court of Riverside County. Elaine H. Kiefer, Judge. Affirmed.

Richard Jay Moller, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Senior Assistant Attorney General, and Michael Pulos, Teresa Torreblanca, and Nora S. Weyl, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant David Roy Hunter, Jr. got angry when his seven-year-old son made a couple of mistakes during a piano lesson. There was sufficient (though controverted) evidence that defendant choked his son and also spanked him twice.

A jury found defendant not guilty of felony child abuse (Pen. Code § 273d, subd. (a)) or misdemeanor child abuse (Pen. Code § 273a, subd. (b)), but guilty of the lesser included offense of misdemeanor battery. (Pen. Code, § 242.) He was placed on probation for two years, on conditions including 90 days in a work release program.

Defendant contends that the prosecutor committed misconduct by stating, in closing argument, that the jury could convict him based on the spanking alone, rather than the choking; or, alternatively, that his defense counsel rendered ineffective assistance by failing to object to these statements. We will hold that the prosecutor's statements were correct, and hence defense counsel was not ineffective.

I

STATEMENT OF FACTS

A. *Background*.

Defendant's ex-wife (mother) lived with their seven-year old son (son) at an apartment in Hemet. She let defendant visit their son there, sometimes overnight. Defendant was teaching their son to read music and to play piano.

B. *The Mother's Account*.

On November 6, 2016, defendant came over to the apartment for an overnight visit with his son. The mother left to stay overnight with a couple that she was friends with.

Later that evening, defendant sent the mother a text message telling her to phone their son immediately. When she did, the son was crying. He said, "I'm stupid," "I messed up." "I don't know how to spell my name. I don't know when is my birthday." He added that defendant had spanked him. Defendant picked up the phone and said that their son was being "insolent and devious."

Still later that evening, defendant texted the mother again, saying, "[Y]ou need to come to . . . stay with your child, 'cause I'm leaving." She left and drove home. She picked up her son, then drove back to her friends' house.

On the way there, the son said that defendant had choked him. She pulled over, looked at his neck with a flashlight, and saw marks on his neck. At her friends' house, one of them also looked at the son's neck and saw bruises.

C. *The Police Interview of the Son.*

The next morning, November 7, a police officer interviewed the son.

The son said that, as part of a piano lesson, defendant told him to write notes under a line. When defendant asked him a question, he "messed up" and got the answer wrong. Defendant spanked him. When he "messed up" again, defendant spanked him again. After he fixed his mistake, defendant grabbed him by the neck with both hands. For about five seconds, he could not breathe.

The officer saw "redness and scabbing" on the son's neck, but no finger marks. He did not see any marks on the son's buttocks. He took photos of both areas.

D. *The Forensic Interview of the Son.*

Later on November 7, a forensic interviewer interviewed the son.

He said he made two mistakes writing music, and defendant spanked him. Defendant also choked him with one hand (i.e., not two). For about five seconds, the son could not breathe. It was only after the choking that the son fixed his mistake.

E. *The Physical Examination of the Son.*

Also on November 7, a forensic pediatrician examined the son. He told her that defendant had long fingernails and had scratched his neck.

She found a horizontal abrasion that wrapped around his neck, and multiple vertical abrasions just above it. The horizontal abrasion was consistent with being choked. The vertical abrasions could have been caused by the son trying to "rake off" defendant's hand. In her opinion, these injuries were not consistent with self-harm.

She also found two purple bruises on the son's buttocks and upper leg, consistent with being spanked. They were visible in photos that she took at the time. However, she had not indicated them on a diagram of his injuries that she made at the time.

F. *The Son's Trial Testimony*.

By the time of trial, the son was eight. He testified that he and defendant were writing music in a binder. When he "got it wrong," defendant got mad and first choked him, then spanked him.

G. *Key Defense Points*.

The mother had used corporal punishment on occasion. If taking away her son's privileges or giving him a timeout did not work, she would spank him with a wooden spoon.

The son had been committing acts of self-harm, such as hitting himself in the head and pulling his hair.

Defendant had "very short" fingernails; the son had long fingernails.

The mother told police that she did not see the marks on the son's neck until she got to her friends' house.

One of these friends testified that it was he who drove the mother to her house to pick up her son and then back to his house. The son did not say the father had choked him. The mother did not look at her son's neck until they got back to the friend's house.

The mother did not call the police until the next morning. She explained, variously, that this was because the son was tired or because the police were busier at night.

The police officer who interviewed the son was not trained in interviewing children. He asked leading questions. An expert testified that this can give rise to false memories.

At the time of the crime, the mother was in the country illegally. Afterward, she applied for a U visa, based on her status as the mother of a domestic violence victim. As a result, she was required to testify truthfully in defendant's prosecution.

II

THE PROSECUTOR'S ARGUMENT THAT DEFENDANT COULD BE CONVICTED BASED ON THE SPANKING ALONE

Defendant contends that the prosecutor misstated the law in closing argument by asserting that the jury could find defendant guilty based solely on the spanking.

A. *The Closing Arguments*.

In closing argument, the prosecutor repeatedly stated that the jury could find defendant guilty of the charged crimes based on either the choking or the spanking.

Regarding count 1 (misdemeanor child abuse), he said, "So you can decide . . . if it's the spanking, or if it's the putting his hands on his son's neck . . . ." "[I]t could be the spanking, but if . . . you say, well, the spanking seemed to be justified or we're just not sure if the spanking was justified, the neck injuries can show that he's guilty of this crime."

Regarding count 2 (felony child abuse), he said that the "traumatic condition" element (see Pen. Code, § 273d, subd. (a)) had been proven by "the bruising and abrasions on [the son's] body . . . ."

He also said, "[Y]ou have to ask yourself what is [defendant] guilty of based on the spanking and based on the strangling . . . ." "[Y]ou have to decide whether he's guilty . . . and based on which act . . . ."

The prosecutor did not discuss the elements or evidence of the lesser included offense of battery; he merely told the jury, "[I]f you find the defendant guilty of both these charges, you don't need to consider the lesser."

Defense counsel did discuss battery; he said, "So Mr. Hunter is not guilty of the two main charges. He's also not guilty of a battery, because he's allowed to spank his child. And that's all he did here is spank his child."

B. *The Jury Instructions*.

The jury was instructed on a parent's right to discipline a child, as follows: "A parent is not guilty of [felony or misdemeanor] child abuse . . . and the lesser crime of battery if he used justifiable physical force to discipline a child. Physical force is justifiable if a reasonable person would find that punishment was necessary under the circumstances and that the physical force used was reasonable. [¶] The People must prove beyond a reasonable doubt that the force used was not justifiable. If the People have not met this burden, you must find the defendant not guilty of [felony or misdemeanor] child abuse . . . and the lesser crime of battery." (CALCRIM No. 3405.)

C. *Analysis*.

Defendant argues that the prosecutor's argument misstated the law because, as a matter of law, the spanking shown in this case was within his right to discipline his child.

"[I]t is misconduct for a prosecutor, during argument, to misstate the law [citation] . . . ." (*People v. Whalen* (2013) 56 Cal.4th 1, 77.) However, "[a]s a general rule, '"[a] defendant may not complain on appeal of prosecutorial misconduct unless in a timely

fashion, and on the same ground, the defendant objected to the action and also requested that the jury be admonished to disregard the perceived impropriety."' [Citation.]" (*People v. Centeno* (2014) 60 Cal.4th 659, 674.) Here, defense counsel forfeited the claimed prosecutorial misconduct by not objecting and not requesting an admonition.

Defendant alternatively contends, however, that this failure to object constituted ineffective assistance of counsel. We therefore address the issue under this rubric.

"'"To establish ineffective assistance of counsel, a defendant must show that (1) counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient performance was prejudicial, i.e., there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to the defendant. [Citation.] . . ."' [Citation.]" (*People v. Rices* (2017) 4 Cal.5th 49, 80.)

"A parent has a right to reasonably discipline by punishing a child and may administer reasonable punishment without being liable for a battery. [Citations.] This includes the right to inflict reasonable corporal punishment. [Citation.] [¶] However, a parent who willfully inflicts *unjustifiable* punishment is not immune from either civil liability or criminal prosecution. [Citations.]" (*People v. Whitehurst* (1992) 9 Cal.App.4th 1045, 1050.)

"Whether a parent's use of discipline on a particular occasion falls within (or instead exceeds) the scope of this parental right to discipline turns on three considerations: (1) whether the parent's conduct is genuinely disciplinary; (2) whether

the punishment is 'necess[ary]' (that is, whether the discipline was 'warranted by the circumstances'); and (3) 'whether the amount of punishment was reasonable or excessive.' [Citations.]" (*In re D.M.* (2015) 242 Cal.App.4th 634, 640-641.)

In defendant's view, "spanking by hand on the butt over clothes" is reasonable discipline as a matter of law. (Capitalization altered.) In support of this proposition, he cites *Gonzalez v. Santa Clara County Dept. of Social Services* (2014) 223 Cal.App.4th 72 and *In re Joel H*. (1993) 19 Cal.App.4th 1185.

In *Gonzalez*, a 12-year-old girl became interested in gangs. (*Gonzalez v. Santa Clara County Dept. of Social Services*, *supra*, 223 Cal.App.4th at p. 76.) She neglected her homework and started getting to school late; her grades dropped. She also started lying to her parents. (*Ibid*.) They tried grounding her and taking away her electronic devices, but without result. (*Id*. at pp. 76-77.) They then laid out specific behavioral standards and warned her that, if she did not comply, they would spank her. She did not, so the mother spanked her five or six times with a wooden spoon over her clothes. (*Id*. at p. 77.) This left visible bruises. (*Id*. at pp. 75, 81.) As a result, a social services agency caused the mother to be listed on the state Child Abuse Central Index. (*Id*. at pp. 75, 81.) The trial court denied her administrative mandate petition. (*Id*. at pp. 75, 84)

The appellate court reversed, because both the social services agency and the trial court had refused to consider whether the spanking constituted reasonable parental discipline. (*Gonzalez v. Santa Clara County Dept. of Social Services*, *supra*, 223 Cal.App.4th at pp. 90-91, 95.) It explained that the spanking had "a genuine and

deliberate disciplinary purpose . . . ." (*Id*. at p. 91.) Moreover, "the circumstances furnished a reasonable occasion for discipline." (*Ibid*.)

It continued, "The only question presenting any difficulty is whether the measure actually applied . . . was reasonable in kind and degree." (*Gonzalez v. Santa Clara County Dept. of Social Services*, *supra*, 223 Cal.App.4th at p. 92.) "We cannot say that the use of a wooden spoon to administer a spanking necessarily exceeds the bounds of reasonable parental discipline." (*Ibid*.) "Nor do we think that the infliction of visible bruises automatically requires a finding that the limits of reasonable discipline were exceeded. Certainly, the presence of lasting bruises or other marks may support a finding that a parent crossed the line between permissible discipline and reportable abuse. [Citations.] However, such effects alone do not compel a finding of child abuse. [Citations.]" (*Id*. at pp. 92-93.)

Thus, the court merely held that the spanking was not excessive or unreasonable "as a matter of law." (*Gonzalez v. Santa Clara County Dept. of Social Services*, *supra*, 223 Cal.App.4th at p. 92.) However, it left open the possibility that it could be found to be excessive or unreasonable as a matter of fact. Significantly, the court did not direct that the mother be *removed* from the list; rather, it directed the social services agency *either* to remove her from the list *or* to hold a new hearing. (*Gonzalez v. Santa Clara County Dept. of Social Services*, *supra*, 223 Cal.App.4th at pp. 95, 102.)

Turning to *Joel H*., there the juvenile court removed a dependent child from relatives with whom he had been placed, based on its finding that they "had physically

and emotionally abused" him. (*In re Joel H.*, *supra*, 19 Cal.App.4th at p. 1192.) Regarding physical abuse, another relative had testified that he saw the caregivers discipline the child by spanking him. (*Id*. at p. 1191.) However, "[h]e either did not witness or could not remember what would precipitate the spankings." (*Ibid*.)

The appellate court found insufficient evidence to support the removal. (*In re Joel H.*, *supra*, 19 Cal.App.4th at pp. 1199-1203.) Concerning the spankings, it said, "There was no evidence that these acts resulted in actual physical harm or posed a danger of such harm . . . . Nor was there proof that the spankings . . . w[ere] outside the realm of legally acceptable and age-appropriate corporal punishment, let alone cruel or abusive conduct. While some might well debate the need for or value of these acts as forms of discipline or effective parenting, they did not appear to exceed legally acceptable behavior for a care provider." (*Id.* at p. 1202.)

Here, unlike in *Gonzalez* and *Joel H.*, there was evidence that there was no reasonable occasion for physical discipline. Defendant's son, who was only seven years old, made two mistakes during a piano lesson. He characterized these as "stupid" and "mess[ing] up" — i.e., as inadvertent, rather than intentional. Defendant complained that his son had been "insolent" and "devious," but this was after the fact, and he did not offer any specifics. The mother testified that she, too, sometimes used corporal punishment, but only after lesser punishments, such as a timeout or taking away privileges, had failed. Reasonable jurors could conclude that spanking was uncalled for.

Also unlike in *Gonzalez* and *Joel H.*, there was substantial evidence that defendant used an excessive amount of force. His son was left with two purple bruises. As *Gonzalez* stated, this "may support a finding that a parent crossed the line between permissible discipline and reportable abuse." (*Gonzalez v. Santa Clara County Dept. of Social Services*, *supra*, 223 Cal.App.4th at p. 92.)

Defendant ignores these two crucial factors — the occasion for the discipline and the amount of force used. His position, if taken to its logical conclusion, would mean that a parent could spank a child, hard enough to leave bruises, at any time, just to remind the child of who's in charge. This is not the law.

We therefore conclude that the prosecutor did not misstate the law and defense counsel did not render ineffective assistance by failing to object.

Defendant also asserts that CALCRIM No. 3405 was erroneous. He has forfeited this as grounds for reversal by failing to raise it under a separate heading, as required. (Cal. Rules of Court, rule 8.204(a)(1)(B); *People v. Luo* (2017) 16 Cal.App.5th 663, 678, fn. 6; *People v. Roscoe* (2008) 169 Cal.App.4th 829, 840.) In any event, he does not identify any particular flaw in the instruction. He simply claims that it was erroneous because it did not absolutely preclude the jurors from convicting him based on the spanking. As we have already held, this was not error.

III

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P. J.

We concur:

RAPHAEL
J.

MENETREZ
J.